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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARTHUR W. MARBLE, JR.,
Captain, United States Air Force,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. WHETHER IN A MILITARY COURT-MARTIAL EVIDENCE CONSISTING ONLY OF TEST RESULTS INDICATING THE PRESENCE OF MARIJUANA IN AN ACCUSED'S URINE IS A SUFFICIENT PREDICATE FACT AS A MATTER OF SUBSTANTIVE LAW AND DUE PROCESS TO JUSTIFY THE DRAWING OF AN INFERENCE OF KNOWING AND WRONGFUL USE OF MARIJUANA ON THE PART OF THE ACCUSED, WHERE THE PROSECUTION'S EXPERT WITNESS TESTIFIES THAT THE MERE PRESENCE OF MARIJUANA METABOLITES IN THE ACCUSED'S URINE DOES NOT SPEAK TO THE QUESTION OF KNOWLEDGE, AND WHERE A FINDING OF A KNOWING AND CONSCIOUS USE IS A PREREQUISITE UNDER MILITARY LAW TO A CONVICTION FOR THE WRONGFUL USE OF A CONTROLLED SUBSTANCE?

2. WHETHER THE COMMON LAW OF THE MILITARY SERVICES AS ESTABLISHED BY THE COURT OF MILITARY APPEALS IN *UNITED STATES V. FORD*, 23 M.J. 331 (C.M.A. 1987) AS APPLIED TO THE FACTS OF THIS CASE, UNCONSTITUTIONALLY SHIFTS THE BURDEN OF PROOF UPON AN ELEMENT OF THE OFFENSE OF WRONGFUL USE OF A CONTROLLED SUBSTANCE TO THE ACCUSED?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Arthur W. Marble, Jr., respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding by a summary disposition on April 8, 1987.

OPINIONS BELOW

The summary disposition of the United States Court of Military Appeals is reported at —— M.J. —— (C.M.A. 1987) (Appendix A). The decision of the United States Air Force Court of Military Review is unpublished, summary disposition (ACM 25034, A.F.C.M.R., 24 March 1968) (Appendix B).

JURISDICTION

The decision of the United States Court of Military Appeals was rendered on April 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

STATUTES INVOLVED

The Uniform Code of Military Justice provides:

> Article 112a. Wrongful use, possession, etc., of controlled substances.

(a) Any person subject to this chapter who wrongfully uses, . . . a substance described in subsection (b) shall be punished as a court-martial may direct.

(b) The substance referred to in subsection (a) are the following:

(1) . . . marijuana and any compound or derivative of any such substance.

U.C.M.J., Article 112a, 10 U.S.C. § 912a.

The Manual for Courts-Martial provides in pertinent part:

37. Article 112a—Wrongful use, possession, etc., of controlled substances.

b. *Elements.*

(2) Wrongful use of a controlled substance

(a) That the accused used a controlled substance; and

(b) That the use by the accused was wrongful.

c. *Explanation.*

(1) *Controlled substance.* "Controlled substance" means . . . marijuana, . . .

(2) *Possess.* "Possess" means to exercise control of something. Possession may be direct physical custody like holding an item in one's hand, or it may be constructive, as in the case of a person who hides an item in a locker or car to which that person may return to retrieve it. Possession must be knowing and conscious . . . An accused may not be convicted of possession of a controlled substance if the accused did not know that the substance was present under the accused's control. Awareness of the presence of a controlled substance may be inferred from circumstantial evidence.

(5) *Wrongfulness.* To be punishable, under Article 112a, possession, use . . . of a controlled substance must be wrongful. Possession, use . . . of a controlled substance is wrongful if it is without legal justification or authorization. Possession, use . . . of a controlled substance is not wrongful if such act or acts are: (A) done pursuant to a legitimate law

enforcement activities (for example, an informant who receives drugs as part of an undercover operation is not in wrongful possession); (B) done by authorized personnel in the performance of medical duties; or (C) without knowledge of the contraband nature of the substance (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Possession, use . . . of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession . . . was wrongful.

e. *Maximum punishments.*

(1) Wrongful use, possession, manufacture or introduction of controlled substance.

(b) Marijuana (possession of less than 30 grams or use) . . . Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specifications.*

(2) Wrongful use of controlled substance.

In that ———— (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about 19—, wrongfully use ———— [a schedule ———— controlled substance]

STATEMENT OF THE CASE

On August 30, 1984, petitioner, a Captain in the United States Air Force, provided a urine sample for testing as part of an inspection of his military unit (R. 64). On September 4, 1984, this sample and others were shipped to a laboratory at Brooks Air Force Base, Texas, for analysis (R. 91-93). Testing of this sample [1] both at

[1] Petitioner concedes, for purposes of this appeal, the legal sufficiency of the chain of custody maintained with respect to his urine sample; he likewise does not attack here the accuracy of the scientific principles involved in the testing of his sample.

the Brooks laboratory and at a civilian laboratory revealed the presence of marijuana metabolites within his urine (R. 256).

On June 10, 11 and 12, 1985, the petitioner faced a trial by court-martial composed of a military judge, sitting alone. After presenting evidence concerning the taking of the sample and the maintenance of the chain of custody over it, the prosecution called Dr. Michael Peat, and qualified him as an expert witness in forensic toxicology, pharmacology, and pharmacokinetics (R. 248-256). On direct examination, Dr. Peat testified that the presence of marijuana metabolites in petitioner's urine sample was consistent with a use of marijuana by petitioner within a thirty-day period prior to his submission of the sample (R. 261-262). Dr. Peat also opined that while it was possible that petitioner might not have felt the effects of the marijuana at the time he ingested it, it was more probable that some effects would have been felt following the introduction of the substance into petitioner's body (R. 263-264).

On cross-examination, Dr. Peat conceded that an oral ingestion of marijuana would produce marijuana metabolites in an individual's urine (R. 265-266), and that the concentrations of the metabolite found in petitioner's urine were not indicative of any particular manner of ingestion of marijuana (R. 267). In fact, tests which could have distinguished an oral ingestion of marijuana from a smoking of the drug had not been performed upon petitioner's sample (R. 268). Dr. Peat admitted that he could not tell—from the urine tests alone—how marijuana had been introduced into petitioner's system (R. 270). He further conceded that if petitioner had been drinking at the time he ingested the marijuana, he might not have noticed or felt the effects of the marijuana, since the drug's effects were similar to those of alcohol, and would have been difficult to distinguish (R. 273). If hashish oil, another source of the hallucinogens within marijuana, had been consumed by petitioner, the tests performed on petitioner's urine would similarly not dis-

closed whether the drug had been smoked or ingested (R. 276).

Testifying in his own defense, petitioner recalled attending several social functions, both on and off the military installation, prior to submitting his urine sample (R. 288-289). He denied having ever smoked marijuana, and pointed out that in prior urine tests none of his earlier samples had ever tested positive for the drug. He had been tested again, in fact, on the very day on which he was notified of his positive test, and the sample submitted then had not revealed any marijuana (R. 290-291). Petitioner denied having ever used any illegal drugs whatsoever, and could offer no explanation of how the drug had entered his system (R. 291).

Recalled by the prosecution in rebuttal, Dr. Peat testified that an unknowing ingestion by petitioner of marijuana—perhaps in food at a party prior to submitting his urine sample—was an "unlikely" explanation of the concentration of metabolites found in the urine sample (R. 313). He conceded, however, that depending upon the form of marijuana ingested, the concentration of chemicals within the substance, and the manner in which the food containing the drug had been prepared, the results obtained in the tests of petitioner's urine could be consistent with an unknowing ingestion of the drug in food (R. 314-317).

Petitioner was convicted of a single count of wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (10 U.S.C. § 912a), and was sentenced to be dismissed from the service, to be confined for a period of five months and to forfeit $1,500.00 for his pay per month for four months. The Air Force Court of Military Review affirmed the findings and sentence on March 24, 1986. The Court of Military Appeals, acting *sua sponte*, then granted review upon its own specified issue:

> WHETHER THE RESULTS OF URINALYSIS TESTS ALONE ARE SUFFICIENT UNDER THE CIRCUMSTANCES OF THIS CASE, AS A MAT-

TER OF LAW, TO SUSTAIN A FINDING OF GUILTY TO WRONGFUL USE OF MARIHUANA.

The Court then rendered its summary affirmance of petitioner's case on April 8, 1987.

REASONS FOR GRANTING THE WRIT

In its summary disposition of petitioner's case, the Court of Military Appeals cited its decisions in *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987, and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987) as controlling. In *Murphy*, the Court of Appeals held that the positive results of a urinalysis, without more, were insufficient as a matter of law to sustain an accused's conviction for wrongful use of marijuana. *Id.*, 23 M.J. 311, 312.[2] Subsequently, in *Ford*, the Court held that such positive test results, when coupled with expert testimony interpreting "the results in terms of ingestion of marijuana" were sufficient predicate facts upon which the factfinder could base the drawing of a permissive inference of wrongful use. *Ford*, *supra*, 23 M.J. at 332, 336-337.

The Court's decision in *Murphy* and *Ford* followed its previous holding in *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986), in which the Court held that "the mere presence of the drug or its constituent element in the body has not been expressly held by this Court to be a fact sufficient to show use of that drug "and that the prosecution in a wrongful use case is required to prove "the *knowing use* of marijuana without justification or authorization" *ibid.*; 22 M.J. at 161-162 (emphasis added). *Accord*: *Murphy*, *supra*, at 312; *Ford*, *supra*, at 336.

Having thus conferred the status of an element of the offense upon the requirement of knowledge in a use case, however, the Court of Appeals found that "this process

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[2] The Court of Appeals specifically found that without expert testimony connecting the presence of the metabolites in an accused's urine to the controlled substance, the factfinder was without an evidentiary basis upon which he could properly draw the inference of use of the substance. *Murphy, supra,* at 311.

[the drawing of an inference of a knowing use of contraband from proof of the presence of the drug in the accused's system] is predicate on a finding of use of a controlled substance . . . *which is not satisfactorily explained to the factfinder.*" *Ford, supra*, at 337 (emphasis added). While holding an accused to such a burden of production of evidence is permissible as to an affirmative defense, the decisions of this Honorable Court make it clear that such a procedure is constitutionally infirm when the defendant is forced to shoulder a burden as to an element of the offense.

QUESTION ONE

Since its decision in *Tot v. United States*, 319 U.S. 463 (1943), this Honorable Court has consistently held that the constitutionality of any statutory inference depends upon the rationality of the connection "between the facts proved and the ultimate fact presumed." *Tot, supra*, 319 U.S. at 463; *United States v. Gainey*, 380 U.S. 63, 66 (1965). In its *Gainey* opinion, the Court emphasized further that:

> The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

Id., 380 U.S. at 67. (There has been no Congressional finding nor is there any evidence of Congressional consideration of the presumption-inference of *knowing* use from the mere presence of a substance in an accused's urine.) The *Gainey* court found such a congressionally-determined, rational connection between the accused's unexplained presence at a still, and the substantive charged offense of 26 U.S.C. § 5601(b)(2), illegal possession of a still and distilling without a bond. In upholding the conviction, the Court pointed out that the jury was instructed to the effect that such "presence" was only "one circumstance to be considered among many." The Court's

majority thus concluded that *where the inference had a rational basis in fact*, bolstered by a specific factual finding by Congress, *and composed only a part of the basis for the accused's conviction*,[3] it could stand.

(Eight months later, the Court declared *invalid* the statutory inference in 26 U.S.C. § 5601(b)(1), finding that the mere presence of an individual at a still dictated *no* rational inference of the crime of possession, custody or control of the operation. *United States v. Romano*, 382 U.S. 136 (1965).)

Following *Gainey* and *Romano*, the Court declared that its "rational basis" requirement was the equivalent of a "more likely than not" standard. *United States v. Leary*, 395 U.S. 6, 36 (1969); *United States v. Turner*, 396 U.S. 398, 416 (1970). In *United States v. Barnes*, 412 U.S. 837 (1973), however, the Court recognized that its holding in previous cases had done little to provide clear guidance:

> The tracking of the foregoing cases [*Tot, Gainey, Romano, Turner* and *Leary, supra*] is not altogether clear . . . What has been established by the cases, however, is at least this: that *if a statutory inference submitted to the jury as sufficient to support conviction satisfied the reasonable-doubt standard* (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) *as well as the more-likely-than-not standard, then it clearly accords with due process.*

Barnes, supra, 412 U.S. at 843 (emphasis added). In a footnote to its opinion the Court explained that *where an inference was sufficient, in and of itself, to satisfy the reasonable doubt standard*, there was no error arising from the *effect* of the burden of production being shifted to the accused:

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[3] *See: United States v. Barunas*, 23 M.J. 71, 76 (C.M.A. 1986); reversing the accused's conviction where the only evidence remaining following the exclusion of improper evidence was the results of a urinalysis.

> It is true that the practical *effect* of instructing the jury on the inference arising from unexplained possession of recently stolen property is to shift the burden of going forward with evidence to the defendant. If the Government proves possession and nothing more, this evidence remains unexplained unless the defendant introduces evidence, since ordinarily the Government's evidence will not provide an explanation of his possession consistent with innocence. In *Tot v. United States*, 319 U.S. 463 (1943), the Court stated that the burden of going forward may not be freely shifted to the defendant. See also *Leary v. United States*, 395 U.S. 6, 44-45 (1969). Tot held, however, that where there is a "rational connection" between the facts proved and the fact presumed or inferred, it is permissible to shift the burden of going forward to the defendant. Where an inference satisfies the reasonable-doubt standard, as in the present case, there will certainly be a rational connection between the fact presumed or inferred (in this case, knowledge) and the facts the Government must prove in order to shift the burden of going forward (possession of recently stolen property).

Barnes, supra, 412 U.S. at 846, n.11 (emphasis added.)

Further clarification as to the proper standard for evaluation of inferences came most recently from the Court in *County Court of Ulster v. Allen*, 442 U.S. 140 (1970). The synthesis of precedent represented by this latter case was recently adopted by the Eleventh Circuit Court of Appeals in *Miller v. Norwell*, 775 F.2d 1572 (1985):

> *Even if the jury instructions in the present case* [to the effect that a failure to account for a misapplication of funds was prima facie evidence of intent to defraud] *created a permissive inference, the instructions would be unconstitutional.* In *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed. 2d 777 (1979), the Supreme Court held that the constitutionality of a permissive inference should be judged in light of the circumstances giving rise to the inference in the particular case. Id. at 162-63, 99

> S.Ct. at 2227; see *Cosby v. Jones*, 682 F.2d 1373, 1376 (11th Cir. 1982). Where the proven fact that is an element of an offense, a permissive inference can be upheld only if, given that the initial fact is proven, it is "more likely than not" that the presumed fact would follow. *See id.* at 1376-77. However, *where the proven fact is the sole evidence of the presumed fact, the inference can be upheld only if, given that the initial fact is proven, the presumed fact would follow beyond a reasonable doubt. See Ulster County Court*, 442 U.S. at 167, 99 S.Ct. at 2230.

Miller, supra, 775 F.2d at 1575 (emphasis added).

In the case *sub judice*, the only proven fact which provided the basis for the inference of *knowing* use of drugs by the accused, was the presence of marijuana metabolites in his urine. While the appellant concedes that the presence of the drugs in his system proves that he had in some fashion ingested the drugs, the mere presence of the metabolites in his urine proves *nothing* as to whether or not such ingestion amounted to a knowing and aware use of these controlled substances. Such an inference, *if* it can be made at all, *cannot* be one which establishes proof beyond a reasonable doubt, and so several courts have held.

The Supreme Court of Kansas, for example, in *Kansas v. Flinchpaugh*, 659 P.2d 208 (1983), held that, where an accused had been charged with possession of cocaine after the substance had been discovered in his system as the result of a blood test:

> Discovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of the drug, *but it is not sufficient to establish guilt beyond a reasonable doubt.* The absence of proof to evince *knowledgeable* possession is the key. The drugs might have been injected involuntarily, or introduce by artifice, into the defendant's system. The prosecution did not establish that [the] defendant ever *knowingly* had control of the cocaine.

Id., at 212.

The Court of Military Appeals has, on several occasions, agreed. *See, e.g.*: *United States v. Cavett*, 6 U.S.C.M.A. 235, 19 C.M.R. 361, 363 (1955), expressly rejecting "the argument that one who uses a drug is inevitably aware of its presence"; *United States v. Wynn*, 11 U.S.C.M.A. 195, 29 C.M.R. 11, 13-14 (1960); *United States v. Grier*, 6 U.S.C.M.A. 218, 19 C.M.R. 344, 347-348 (1955).

Since the sole predicate fact going to the element of knowledge in the case *sub judice*—the presence of a marijuana metabolite in the accused's urine—is insufficient to establish, beyond a reasonable doubt, a knowing ingestion of the drug by the accused (indeed, such was conceded by the prosecution's expert at trial), the accused's conviction cannot be allowed to stand.

QUESTION TWO

A. The Prosecution, Not The Accused, Has The Burden Of Proving Every Element Of A Criminal Offense Beyond A Reasonable Doubt.

The burden of proof to establish each element of a criminal offense beyond a reasonble doubt rests with the prosecution, and a shifting of such a burden (*upon an element of an offense*) to the accused is an unconstitutional violation of due process. *In re Winship*, 397 U.S. 358 (1970). "In certain circumstances, *Winship's* reasonable doubt requirements applies to facts not formally identified as elements of the offense charged." *McMillan v. Pennsylvania*, —— U.S. —— (1986).

B. An *Aware* Or *Knowing* Use Of A Controlled Substance Is An Essential Element Of The Offense Of Wrongful Use Of A Controlled Substance.

An essential element of the wrongful use of a controlled substance, as presently set forth by Article 112a of the U.C.M.J., and the 1984 Manual for Courts-Martial, is that the use by the accused be "wrongful." M.C.M., 1984, para. 37b(2)(b). "Wrongfulness" is then defined in paragraph 37c(5) as follows:

> (5) Wrongfulness. To be punishable under Article 112a . . . use . . . of a controlled substance must be wrongful. . . . Use . . . of a controlled substance is wrongful if it is without legal justification or authorization. Use . . . *of a controlled substance is not wrongful* if such act or acts are: . . . (C) *without knowledge of the contraband nature of the substance* (for example, a person who possesses cocaine, but actually believes it to be sugar, is not guilty of wrongful possession of cocaine). Use . . . of a controlled substance *may be inferred to be wrongful in the absence of evidence to the contrary. The burden of going forward with evidence with respect to any such exception in any court-martial or other proceeding under the code shall be upon the person claiming its benefit. If such an issue is raised by the evidence presented, then the burden of proof is upon the United States to establish that the use, possession, distribution, manufacture, or introduction was wrongful.*

(Emphasis added.)

So stated, the Manual's proscription against the use of controlled substances is merely a codification of military common law procedure. Before *those* authorities are discussed, however, an analysis of paragraph 37c(5), *supra*, is appropriate.

The Manual specifies that before a use of a controlled substance may be punished under Article 112a, such use must be "wrongful"; and a use is "wrongful", if it is without legal justification or authorization." The definitive paragraph then sets out three statutory "exceptions" which would relieve an accused of criminal liability, and states that "the burden of going forward with evidence" (the burden of *production*) "with respect to any such exception . . . shall be upon the person claiming its benefit" (the accused). An examination of these three "exceptions" reveals one critical distinction between these true *affirmative defenses* (set out as: (A) an act done pursuant to legitimate law enforcement activities, (B) an act done pursuant to medical authorization, (C) [in-

gestion] "without knowledge of the contraband nature of the substance" (i.e., *a mistake of fact*), and an ingestion of a substance performed without the knowledge of the presence of a contraband substance within the matter ingested.

If there is an elemental requirement of scienter or mens rea within a "wrongful use", such that the accused's use must be *knowing*, then *a mere statement of this element of the offense in the negative does not convert such an element into an "affirmative defense", thereby absolving the prosecution of its burden to prove that element beyond a reasonable doubt* (and, as a consequence, shifting the burden of proof—or of production—to the accused.) (*See*: *United States v. Sorrell*, 23 M.J. 122 (C.M.A. 1986), Everett, C.J., concurring, at 124.)

With this premise in mind, the history of the Manual provisions, and the judicial interpretations of its evolution, should be examined.

The complex intricacies of this issue were dealt with at length in the Court of Military Appeals' decision in *United States v. Greenwood*, 6 U.S.C.M.A. 209, 19 C.M.R. 335 (1955), a case in which the accused requested of a Japanese female that she obtain narcotics for him. A consensual urinalysis taken after his apprehension revealed the presence of morphine. At trial, the accused remained silent, but the defense did produce evidence through another witness to the effect that the accused's female companion, having quarreled with the accused, had placed a foreign "suicide powder" in the accused's beer and cigarettes. The accused, being intoxicated, was unaware of the presence of this foreign matter. The members of the court were instructed that "if the accused honestly *and reasonably*[4] labored under the

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[4] The Court of Appeals has consistently held that the knowledge element in a wrongful use case requires an actual, *honest* knowledge; and accused may not properly be convicted for unreasonably failing to ascertain the fact of the presence of contraband in ingested matter. *United States v. Lampkins*, 4 U.S.C.M.A. 31, 15 C.M.R. 31 (1954); *United States v. Crawford*, 6 U.S.C.M.A. 517,

mistaken belief that the beer and cigarettes . . . were not contaminated by a narcotic, he was entitled to an acquittal." *Id.*, at 19 C.M.R. 337 (emphasis added).

Judge Brosman, writing for the Court, sought to distinguish between the various sorts of "knowledge" which might be at issue in a case involving the possession or use of drugs:

> It must be said at the outset that our decision in the present case will be controlled largely by our pronouncements in *United States v. Hughes*, 5 U.S.C.M.A. 374, 17 C.M.R. 374,[5] and *United States v. Reese*, 5 U.S.C.M.A. 560, 18 C.M.R. 184. In those two cases we held that the giving of an instruction to the effect that *knowledge on the part of an accused of the physical presence of a narcotic—where that issue is reasonably raised by evidence—is a prerequisite to valid findings of guilty of the wrongful possession of a habit-forming drug.* Further in the Hughes case, supra, we commented on the dichotomy between *knowledge of the contraband character of the object possessed*, on the one hand, and *knowledge of*

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20 C.M.R. 233 (1955); *United States v. McCluskey*, 6 U.S.C.M.A. 545, 20 C.M.R. 261 (1955); *United States v. Berger*, 6 U.S.C.M.A. 601, 20 C.M.R. 317 (1956); *United States v. Jones*, 7 U.S.C.M.A. 83, 21 C.M.R. 209 (1956); *United States v. Holloway*, 10 U.S.C.M.A. 595, 28 C.M.R. 161 (1959); *United States v. Baylor*, 16 U.S.C.M.A. 502, 37 C.M.R. 122 (1967).

[5] The *Hughes* Court concluded that the knowledge of the existence of the object ("the defendant's awareness of the presence of the object") was a "basic element of the offense of possession", citing *People v. Gory*, 28 Cal. 2d 450, 170 P.2d 433 (1946); 17 C.M.R. at 376, 377. An instruction by the law officer to the *Hughes* members that the possession of marijuana had to be "wrongful" to sustain a conviction was held to be insufficient to cover "the field of awareness or conscious knowledge." *Id.* at 377. *See also: Hughes* at 377-378, discussing the distinction between instructions upon knowledge as an element of an offense, and instructions as to affirmative defense: "It is unimportant whether we designate knowledge an element . . . or . . . an affirmative defense, because, if in issue, the court must be told to consider it in arriving at a finding." *Accord: United States v. Wallace*, 2 U.S.C.M.A. 595, 10 C.M.R. 93 (1953).

> *its presence within the control of the possessor*, on the other—and concluded that knowledge of the former type was immaterial, but that *consciousness of the physical presence of the drug involved there was a necessary concomitant of its wrongful possession.*
>
> Purporting to recognize these principles, Government counsel suggest that, since knowledge of the nature of the object is of no essential importance in wrongful possession cases, it is likewise immaterial to a determination that an accused wrongfully used a narcotic. *We are then told that in wrongful use cases, quite unlike those involving possession, an awareness of the presence of the commodity consumed will seldom, if indeed ever, become an issue—this for the reason that one who takes a substance into his body is necessarily aware that he is doing so, although he may not realize the nature of the matter consumed.* Since the accused here must have known that he had smoked the tainted cigarettes and drunk the poisoned beer—the argument concluded—he is not entitled to an instruction related to a want of knowledge that tobacco smoke and an alcoholic beverage, both allegedly containing foreign matter, had entered his body.
>
> Since *this argument completely misinterprets our decision in United States v. Hughes, supra*, it is apparrent that confusion has arisen respecting our prior expressions in this area.

Id., at 19 C.M.R. 337-338 (emphasis added).

After noting that the (1951) Manual for Courts-Martial did not directly address either the substance of the offense of "use" of a drug, or any knowledge requirements thereof, Judge Brosman concluded that the rule "which announces that the *possession* of a narcotic drug is presumed to be wrongful unless the contrary appears," was based upon a provision of 21 U.S.C. § 174 [6] which

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[6] This provision, since repealed, provided that when a "defendant is shown to have or have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the

denounced the fraudulent or *knowing importation* of narcotics into the United States. The *Greenwood* Court explained that what this section contemplated was:

> *The placement of some sort of burden on the defendant to establish a lack of knowledge—thus absolving the Government from the difficult task of proving this element* by extrinsic evidence. Similarly we think, the framers of the Manual sought to enunciate a rule which would require one accused of the wrongful possession of drugs to present facts sufficient to raise a defense for submission to the court-martial.

Greenwood, supra, 19 C.M.R. at 339 (emphasis added). In a footnote to this explanation, the Court further elaborated:

> It should be apparent that the *Federal act*, in placing the burden of explaining "possession" on the defendant, *did not purport to deal with the defense of ignorance of the physical presence of a drug*, as exemplified in *United States v. Hughes*. Rather, 21 U.S.C. § 174 contemplates the situation in which a defendant is trapped with narcotics within his control, and is unable to account for their presence. See *Pitta v. United States*, 164 F.2d 601 (Ca. 9th Cir.). A defense claim of lack of knowledge within the purview of the Federal act, then, would equate either to an ignorance of the physical composition of the substance discovered—as we will discuss in subsequent paragraphs of this opinion—or to an unawareness that the narcotic in question was unlawfully imported.

Id., at 339 (emphasis added).

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satisfaction of the jury." Instructions allowing juries to draw inferences based upon this section have been held to be erroneous with respect to possession of cocaine, *Turner v. United States*, 396 U.S. 398, 418-419 (1970) and with respect to marijuana, *United States v. Leary*, 395 U.S. 6, 29-53 (1969) (holding the statutory presumption unconstitutional as "irrational" and "arbitrary"). (*See also: Legal and Legislative Basis*, M.C.M., 1951 at 294, confirming the Court's conclusion that the "presumption" of wrongfulness in the Manual was, in fact, based upon 21 U.S.C. § 174.)

Having decided that the federal statute on which the then existing Manual provision (paragraph 213a, M.C.M. 1951) was based, did *not* contemplate a discarding of the element of knowledge (as to the *presence* of a drug, vis-a-vis the *contraband nature* of a substance), Judge Brosman concluded that "the *element* of scienter is not eliminated from the crime of wrongful possession of a narcotic drug simply because it received no explicit mention in the Manual section relating to the offense." *Id.*, at 339 (emphasis added).

To this point, the Court's opinion in *Greenwood* is unassailable. Thereafter, however, it must be questioned, for Judge Brosman, having correctly reasoned that the "element of scienter" remained in cases involving the wrongful *possession* of drugs, then wrote that this "awareness of the very presence of the substance in question . . . *will become a material issue where the defense of lack of this variety of knowledge is reasonably raised by the evidence.*" *Id.* at 341 (emphasis added). *The effect of this reasoning was to require a criminal accused to shoulder a burden of production of evidence before he could be entitled to an instruction upon what was already a critical element of the offense.* Such a rule is a violation of due process, since the prosecution carries the burdens both of proof and production as to all elements of the offense (*In re Winship, supra*) and since, absent an express determination by Congress to the contrary, every criminal offense which subjects an accused to felony-strength punishments carries within it an inherent element of a criminal state of mind. *Morisette v. United States*, 342 U.S. 246 (1952). Without such a state of mind, which in a "use" case could *only* flow from a knowledge of the presence of the substance used, an accused punished for a "wrongful use" of drugs would, in effect, have been held *strictly liable* under a *malum prohibitum* theory. There is nothing in the history of military or federal law to show that Congress intended to so proscribe the use of drugs (in fact, the very existence of statutory exceptions argues *against* a strict criminal lia-

bility theory), and, in the absence of such an explicit statutory finding, such an application of law is unconstitutional. *Morisette, supra.*[7]

To some extent, the failure of the *Greenwood* court to deal directly with the status of knowledge as a basic element of the offense of wrongful *use* of a drug can be traced to the lack of statutory guidance in both federal law and the Manual for Courts-Martial. Paragraph 213a of the 1951 Manual simply provided that:

> It is a violation of this article *wrongfully to possess marihuana or a habit forming narcotic drug.* Possession of marihuana or of a habit forming narcotic drug is presumed to be wrongful unless the contrary appears.

It is readily apparent that this brief provision did not address the elements of a wrongful *use* of a drug, nor did it specify the *mens rea* required even for a wrongful possession. The federal statute in being (21 U.S.C. § 174, discussed *supra*) was similarly silent as to *use* offenses.[8]

By contrast, the 1969 Manual for Courts-Martial *provided* a *mens rea* requirement for *possession* offenses within its definition of "possession," by stating that such "possession must be *knowing and conscious.*" M.C.M., 1969 (Rev.), Change 7, paragraph 213 g (15 April 1983). While the term "use" was not separately defined, the sample specification for the offense of wrongful use of a controlled substance read:

> 145. In that ———— (personal jurisdiction data), did, (at/on board-location) (subject matter jurisdiction data, if required), on or about ———— 19—,

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[7] Accord: *Liparota v. United States*, 471 U.S. 419 (1985), holding that when no mental state is specified in a criminal statute, the "rule of lenity" must be applied, with any ambiguity resolved in favor of the accused, and the requirement of a *mens rea* preserved. *See also: United States v. Doyle*, 3 U.S.C.M.A. 585, 14 C.M.R. 3 (1954).

[8] The present federal statute, 21 U.S.C. § 841, does not prohibit or address *use* offenses.

knowingly and wrongfully use ———— (a Schedule ———— controlled substance)

M.C.M., 1969 (Rev.), Appendix 6c (Change 7, 15 April 1983) (emphasis added). The 1984 Manual has retained the "knowing and conscious" language in defining "possession" (M.C.M. 1984, para. 37a (2)), but, like its predecessor, does not define "use". The analysis to the present Manual does, however, specify that Article 112a was intended to be consistent with Appendix 6c of the 1969 Manual. M.C.M., 1984, at A21-93, Nevertheless, the sample specification for the offenses of wrongful use of controlled substances in the present Manual reflects, *without explanation*, the deletion of "knowingly," requiring only that the use must be alleged to have been "wrongful."

Unfortunately, the legacy of this confused history is *presently* found in DA Pam 27-9, Military Judges' Benchbook, Paragraph 3-76.4 (Change 1, 15 February 1985), the instruction guide used by military judges at trial. Note 1 to this instruction as to the elements of the offense of wrongful use of drugs provides in pertinent part:

> If an issue of innocence use *on the grounds of ignorance or mistake of fact* concerning the *presence or nature*[9] of the substance is raised [an instruction upon] Ignorance or Mistake of Fact . . . in Drug Offenses, should be given. Additionally, *the elements of the offense should be modified to include the requirement that the requisite knowledge must be found beyond a reasonable doubt.*

Id. (emphasis added). Since knowledge of the *presence* of the contraband is an elemental, *scienter* ingredient of the offense, and *not an affirmative defense* matter, *this instruction thereby requires an accused to produce evidence upon an issue before he is entitled to an instruction*

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[9] The *Greenwood* distinction between the various types of knowledge involved in drug offenses is thus destroyed, as this note to the instruction purports to treat ignorance of the *presence* of a drug in the same fashion as ignorance of the contraband *nature* of a substance.

upon it, even though the issue concerns an element of the offense charged. Only after this shifted burden of production is satisfied are the elemental instructions "modified" to include the requirement of knowledge; otherwise, the members of the court-martial are not to be instructed with regard to this element.

This note also specifies that the "burden of going forward with evidence" as to any of the three statutory exceptions [10] is "upon the accused," and that, if such an issue is raised, the instruction found at paragraph 3-76.1 should be given. That instructon provides for the tailoring of an affirmative defense instruction based upon exceptions (A) and (B)—medical excuse or lawful authorization—but does *not* address any "affirmative defense" based upon a lack of knowledge on the part of an accused.

Yet another decision of the Court of Military Appeals, yields cause to question the burden-shifting procedure which the Manual had adopted. In *United States v. Cavett*, 6 U.S.C.M.A. 235, 19 C.M.R. 362 (1955), the Court unanimously rejected an attempt by the Air Force Board of Review to categorize the offense of wrongful use of drugs as a quasi-strict-liability offense.[11] The Air Force Board had first recognized that, in possession cases, "*knowledge* of the presence of [contraband], when reasonably placed in issue by the evidence, *partakes of the nature of an element of the offense, and must be included in instructions on the elements.*" *Cavett, infra*, 18 C.M.R. at 796-797 (emphasis added). The Board of Review then proceeded, however, to conclude that such knowledge did not "partake of the nature of an element of the offense" or wrongful *use* of drugs, because:

> Knowledge of the presence of the object always exists in a "wrongful use" case (unless one is not mentally responsible because of impaired mental faculties) for "use" by common understanding involves employment

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[10] Taken *verbatim* from M.C.M. 1984, para. 37b(2)(b), *supra*.

[11] *United States v. Cavett*, 18 C.M.R. 793 (A.F.B.R. 1955), *reversed*, 6 U.S.C.M. 235, 19 C.M.R. 361 (1955).

> of the object and this inherently required an awareness of its presence.

Id., at 797.

In a unanimous opinion, the Court of Military Appeals reversed. Judge Brosman, writing again for the Court specified that the Court *rejected expressly* the argument that one who uses a drug is inevitably aware of its presence.[12] In addition, while the accused in *Cavett* had denied any knowing use of drugs, but had offered *no* evidence which could explain the presence of drugs in his system, the Court rejected the government's suggestion that no "affirmative defense" had been raised, stating, "we are sure that no explanation was required to raise the issue of knowledge." *Cavett, supra*, 19 C.M.R. at 363. (This was certainly correct, since a plea of not guilty to a charge places every element of the charge in issue.)

Nevertheless, military appellate courts have, in the absence of statutory guidance as to the true nature of the knowledge *element*, improperly continued to treat knowledge in drug use cases as a matter raised only by affirmative defense,[13] even though language "partaking in the nature of an element" is often used to describe such a "defense."[14] These decisions cannot be viewed as

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[12] Dr. Peat, the government expert in the case *sub judice*, testified that he could *not*, simply from a review of the laboratory test results, tell exactly how the substances were used, nor could he rule out an unknowing oral ingestion.

[13] *See* e.g.: *United States v. Yates*, 16 C.M.R. 629 (A.F.B.R. 1954), *petition denied*, 16 C.M.R. 292 (C.M.A. 1954); *United States v. Moore*, 24 C.M.R. 647 (A.F.B.R. 1957); *United States v. West*, 15 U.S.C.M.A. 3, 34 C.M.R. 449 (1964).

[14] *United States v. Taylor*, 17 C.M.R. 753, 758 (A.F.B.R. 1954) (use of marijuana must be "willing and conscious"); *United States v. Alverez*, 10 U.S.C.M.A. 24, 27 C.M.R. 98, 101 (1958) (to sustain a conviction for possession, it must, of course, appear beyond a reasonable doubt from the evidence that the accused had conscious knowledge of the presence of the prohibited substance"); *see also United States v. Thompson*, 21 U.S.C.M.A. 526, 45 C.M.R. 300

consistent with the pronouncement of the same courts which have consistently recognized the necessity of treating a *mens rea* as an essential element of an offense.

In *United States v. Walters*, 10 U.S.C.M.A. 598, 28 C.M.R. 164, 167 (1959), for example, the Court of Military Appeals held that where knowledge is an element of an offense, the members must be instructed upon that element, *whether or not the accused raises the issue as an affirmative defense of ignorance or mistake of fact. Accord: Screws v. United States*, 325 U.S. 91 (1959). It is axiomatic that if such *mens rea* is an element, entitling an accused to an instruction, it is the *prosecution* upon whom the burdens of proof and production fall—*not the defense. In re Winship, supra.* The courts' very treatment of ignorance or mistake of fact as affirmative defenses is further proof that some knowledge is an *element* of a use offense, since ignorance or mistake of fact can only affect "the question of [the accused's intent or knowledge *"where such is an element of the offense charged."* *United States v. Tucker*, 14 U.S.C.M.A. 376, 34 C.M.R. 156, 160 (1964). In fact, where the knowledge issue is already an element of the offense charged, an instruction on the affirmative defense of ignorance or mistake of fact may be erroneous, especially where the true issue is not a mistake or ignorance, but the total lack of a criminal *mens rea. Tucker, supra*, at 160-161; *United States v. Roberson*, 12 U.S.C.M.A. 719, 31 C.M.R. 305 (1962); *United States v. Rowan*, 4 U.S.C.M.A. 430, 16 C.M.R. 4, 10-11 (1954).

The distinction critical to this issue is, of course, that while an accused *will* have the knowledge required to assert an affirmative defense (such as lawful authorization to use a drug, or a mistake of fact such as using the wrong drug by mistake), he will not *and cannot* possess *any* knowledge or affirmative matter to even as-

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(1972); *United States v. McMurray*, 6 M.J. 348 (C.M.A. 1979); *United States v. Rowe*, 11 M.J. 11 (C.M.A. 1981); *United States v. Newman*, 14 M.J. 474 (C.M.A. 1983).

sert where he is totally unaware of how, when, or where a contraband substance is ingested. Absent proof upon this essential element or *mens rea*, no offense has been established, and absent a clear expression by Congress of its intent to make such an innocent use a *malum prohibitum* offense, no such offense exists. *Morrisette, supra*; *Liporata, supra*; *see also*: *United States v. Bass*, 404 U.S. 336 (1971); and *United States v. Grissom*, 645 F.2d 461 (5th Cir. 1981) (ambiguities in statutory construction of a criminal statute must be resolved in favor of the accused.)

There are three distinct types of knowledge which may be of consequence in a drug use or possession case. The distinction between them is a critical one. The first, using possession cases as analogy, may arise when an accused asserts, for example, that he *knew* he was *in possession* of a white powder, that he believed the powder to be cocaine, but that the substance was, in fact, amphetamines. If charged with the illegal possession of amphetamines, the accused's mistaken belief that the substance was cocaine is of little utility to him, for this "mistake of fact", even if believed, would still leave the accused with a culpable *mens rea*. *See e.g.*: *United States v. Vandenheuvel*, 10 M.J. 591 (N.C.M.R. 1980); *petition denied*, 11 M.J. 163 (C.M.A. 1981).

The second knowledge question concerns the true affirmative defense of mistake of fact, to the effect that if the accused *knows*, that he is *in possession* of a white powder, but mistakenly believes it to be sugar and is unaware of the fact that it actually is cocaine, he must assert this defense at trial. If he is able to raise this affirmative defense, then an instruction must follow, because proof of *possession* is not *wrongful* if, the accused is unaware "of the contraband nature of the substance." M.C.M. 1984, para. 37(c)(5).

The third type of knowledge which must be recognized is that of the physical presence of the drug itself, for *without* such *knowledge, there is*, in effect, *no possession* as defined in the Manual, *whether or not the pos-*

session is "wrongful." The Manual's definition of "possession" requires that the control exerted over the contraband by the accused be "knowing and conscious." M.C.M. 1984, para. 37(c)(2) This *mens rea* knowledge requirement is, therefore, incorporated by reference, *not* into the element of wrongfulness, *but into the element of possession itself.* It is stated separately and apart from the definition of wrongfulness and must be considered separately, for it is this knowledge that forms the *mens rea* of the offense. *United States v. Greenwood*, 6 U.S.C.M.A. 209, 19 C.M.R. 335, 337-338 (1955).

As an element, this *mens rea* knowledge need *not* be raised as an affirmative defense nor placed in issue by the accused. *United States v. Cavett*, 6 U.S.C.M.A. 235, 19 C.M.R. 361, 363 (1955) ("no explanation was required to raise the issue of knowledge"); *United States v. Wilson*, 7 M.J. 290 (C.M.A. 1979) (where *sole* witness at trial was CID agent, element of knowledge as to possession was still in issue; conviction reversed for insufficient evidence as to this element). *See also*: *United States v. King*, 17 M.J. 1099 (A.F.C.M.R. 1984).

As recognized by the Court of Military Appeals in *Harper*, "use" of drugs, unlike possession, is not defined in the Manual. *Harper*, at 161. It is the elemental, *mens rea*, knowledge of ingestion in a use case that is, therefore, omitted from any definitional classification in the Manual. The Court of Military Appeals appears to have alleviated the confusion as to the status of knowledge as an element by its decision in *Ford*[15] (*supra*, at 333, 336); it has, however, left in place the burden-shifting procedural apparatus stemming from the confusion of the *elemental* form of knowledge (the presence of contraband in something ingested) with those forms

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[15] Since *Ford* was decided subsequently to the bench trial in the case at bar, the military judge did not have the benefit of the Court of Appeals' decision clarifying the status of knowledge as a true element of the offense.

of knowledge representing non elements—affirmative defenses.

C. It Is A Violation Of Due Process To Shift To An Accused The Burden Of *Production* Of Evidence (As Well As Any Burden Of Proof) Upon An Element Of An Offense.

In *United States v. Wynn*, 11 U.S.C.M.A. 195, 29 C.M.R. 11 (1960), the Court of Appeals held that an instuction [16] which shifted the burden to an accused to prove his use of morphine (discovered through a urinalysis) was innocent, was prejudiacl error. That decision, as well as numerous decisions of this Honorable Court and other jurisdictions, discussed *infra*, lead to the conclusion that the accused in the case *sub judice* has similarly been the victim of error of constitutional dimension, and his conviction should be set aside.

Since *Greenwood* and *Wynn*, *supra*, a considerable body of federal case law has developed as to when a burden could (or could not) be shifted to an accused.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1974), this Honorable Court reversed a murder conviction after finding error in an instruction which shifted the burden of proof of an element of the offense to the accused. At trial, the jury was instructed that malice (an element of the offense of murder as defined by the statute) need not be established by the prosecution since malice would be implied *unless* the defendant proved that he had acted in the heat of passion. *Id.*, n.4 at 421 U.S. 686.

The Court held such an instruction to violate the due process clause of the Fourteenth Amendment, since, in

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[16] The instruction under scrutiny in *Wynn read*:

> The presence of morphine in the urine is *incontestable proof* of administration by eating, smoking, or injection. *Although its use*, when properly prescribed by a physician, or *when consumed by accident or mistake, is clearly innocent, the Government is not required to negative the existence of these exceptions* in such case. *Such explanation must come from evidence produced on behalf of the accused.*

29 C.M.R. at 14 (emphasis added).

accordance with its previous holding in *In re Winship, supra*, it was the *prosecution's* burden to prove malice, and, therefore, the *absence* of heat of passion or of provocation. The effect of the statute, and of the instruction based upon it, was an unconstitutional shifting of the burden of proof ("by a preponderance of the evidence") to the defendant. *Id.*, 701-703.

In so holding, the Court specifically rejected the government's contention that logic and the logistics of proving or disproving a state of mind dictated that the accused should bear the burden of proof upon such an issue:

> It has been suggested . . . that because of the difficulties in negating an argument that the homicide was committed in the heat of passion, the burden of proving this fact should rest upon the defendant. No doubt this is often a heavy burden for the prosecution to satisfy. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which criminal justice deems essential. . . . *Although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not* . . . justify shifting the burden to him. [Citations omitted].

Id., at 701-702 (emphasis added).

Three years later, however, a majority of this Court held that *Mullaney* was being read too broadly by the states. In *Patterson v. New York*, 432 U.S. 197 (1977), the jury had been instructed, in accordance with New York law, that an accused charged with murder "had the burden of proving his *affirmative* defense by a preponderance of the evidence. *Id.*, 432 U.S. 200. The majority found no error in such a procedure, and affirmed. *Mullaney* was distinguished in that the Maine procedure found defective in that case had shifted a burden to the accused to prove (or disprove) *an "ingredient" of the offense* "which was mentioned in the statutory definition of the crime":

> *Mullaney* surely held that a State must prove every *ingredient of an offense* beyond a reasonable doubt, and that *it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense.* This is true even though the State's practice, as in Maine, had been traditionally to the contrary. *Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.*

Id., 432 U.S. 197 (emphasis added).

The Court's contrasting of the *permissible* burden shift as to an *affirmative defense* [17] versus an improper shifting of a burden as to an *element* of the offense was set forth in part in footnote 9 of the Court's opinion, drawing the distinction between affirmative defense cases and *Mullaney*:

> "The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that *the state shall have proved enough to make it just for the defendant to be required to repel what has been proved* with excuse or explanation, or at least that *upon a balancing of convenience or of the opportunities for knowledge* the shifting of the burden will be found to be an aid to the accuser *without subjecting the accused to hardship or oppression.* Cf. Wigmore, Evidence, Vol. 5, §§ 2486, 2512 and cases cited. . . .

Id., at 432 U.S. 203, 204 (emphasis added).

The Court found no fault in the New York statute or procedure, for, unlike the facts in *Mullaney*, the statute under which *Patterson* was tried "included all the facts which the state was required to prove beyond a

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[15] Placing the burden of going forward with evidence *as to an affirmative defense* is normally permissible. *Engle v. Isaac*, 456 U.S. 107, 120-121 (1982); *Simopoulas v. Virginia*, 462 U.S. 506 (1983).

reasonable doubt if a person was to be convicted of murder. No further facts [were] *either presumed or inferred* in order to constitute the crime." *Id.*, 432 U.S. 205-206 (emphasis added). Additionally, the affirmative defense of extreme emotional disturbance did "*not serve to negative any facts of the crime* which the State is to prove in order to convict" the accused. Instead, the true affirmative defense under scrutiny constituted "a separate issue". *Id.*, 432 U.S. 206-207 (emphasis added).

In *Patterson*, this Court thus refused to place upon the prosecution the burden of disproving *true affirmative defenses*, but clearly also refused to shift to a defendant any burden of disproving the *elements* of an offense:

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must *disprove* beyond a reasonable doubt every fact constituting any and all *affirmative defenses* related to the culpability of an accused. . . . We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the *elements* included in the definition of the offense of which the defendant is charged.

Id., 432 U.S. 210, 97 S.Ct. 2327 (emphasis added).

The case law (now including *Ford*, *supra*) and military regulations (DA Pamphlet 27-9, *supra*) in effect of the time of petitioner's bench trial operated to relieve the prosecution of its burden of proof (as to the element of knowledge of the presence of drugs in something ingested) by proposing that a permissive inference of wrongfulness could be drawn from the sole predicate fact of the presence of the drug in the accused's system, "in the absence of evidence to the contrary." *Ford*, *supra*, at 333-334, quoting the Manual for Courts-Martial, para. 37(c)(5) (1984).

The synthesis of this Honorable Court's opinions on the issue is that a criminal accused, as a matter of constitu-

tional due process, may not be saddled with the burden of establishing the absence of essential facts constituting the crime charged, but may be required to prove facts that are collateral and wholly independent thereof, such as those constituting a true affirmative defense. *Rodriguez v. Smith*, 428 F.Supp. 892, 895 (D.C. N.Y. 1977). The due process clause does not, therefore, prevent the state from creating affirmative defenses based upon justifications wholly independent of the essential facts or elements constituting the crime, and, in doing so, placing the burden of production of evidence supporting that defense upon the accused. For facts to be properly classified as an "affirmative defense", however, they must operate as an excuse or justification for an accused, who in effect admits his guilt, but pleads nonenforceability on other grounds. *United States ex rel. Crosby v. Delaware*, 346 F.Supp. 213, 216 (D.C. Del. 1972). The creation of an affirmative defense must also be undertaken by a state only upon a rational basis. *Id.*, at 216. There is neither a rational basis, nor even an addressing of the matter at all, in the present Manual's attempter elimination or omission of the *scienter* required (knowledge of the *presence* of a drug) as an element of the offense of wrongful use of controlled substances, or in the attempted conversion by the Manual, military courts, or service regulations, of this *scienter* element into an affirmative defense.

CONCLUSION

Petitioner submits that his petition for a writ of certiorari should be granted in order to fully examine the crucial statutory and constitutional questions raised by his own trial, and to safeguard the similar interests of other military accused facing trial by courts-martial and the impossible task of proving themselves innocent in the event of an unexplained, positive result in a urinalysis test.

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APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 55479/AF

CMR Dkt. No. 25034

UNITED STATES,

Appellee

v.

ARTHER W. MARBLE, JR. (587-34-4335),

Appellant

ORDER

On consideration of the granted issue (23 M.J. 265) in light of *United States* v. *Ford*, 23 M.J. 331 (C.M.A. 1987), and *United States* v. *Murphy*, 23 M.J. 310 (C.M.A. 1987), it is, by the Court, this 8th day of April, 1987,

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (WIMS)
Appellate Government Counsel (VAN NUYS)

APPENDIX B

UNITED STATES AIR FORCE COURT
OF MILITARY REVIEW

ACM 25034

UNITED STATES

v.

CAPTAIN ARTHER W. MARBLE, JR., 587-34-4335 FV
UNITED STATES AIR FORCE

[24 Mar 1986]

Sentence adjudged 12 June 1985 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Andrew C. Pratt (sitting alone).

Approved sentence: Dismissal, confinement for five (5) months and forfeiture of one thousand five hundred dollars ($1,500.00) per month for four (4) months.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Lieutenant Colonel Michael D. Wims. Appellate Counsel for the United States: Colonel Kenneth R. Rengert and Captain Marc Van Nuys.

Before

SESSOMS, MURDOCK and CARPARELLI
Appellate Military Judges

DECISION

PER CURIAM:

We have examined the record of trial, the assignment of errors, and the government's reply thereto and have concluded that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the accused was committed. Accordingly, the findings of guilty and sentence are

AFFIRMED.

[SEAL]

Official:

/s/ Elva J. Smith
ELVA J. SMITH
Documents Examiner

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Nos. 86-1953, 86-1954, and 86-1955

In the Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
FILED
AUG 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

RENA O. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ARTHUR W. MARBLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

CALVIN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an instruction permitting a court-martial panel to infer that petitioner's use of marijuana was "wrongful" shifted the burden of proof on that element of the offense to petitioner (Nos. 86-1953, 86-1954, and 86-1955).

2. Whether the military's procedure of warrantless, random, compulsory urinalysis inspections violates the Fourth Amendment in the absence of a reasonable suspicion that a servicemember has used narcotics (No. 86-1955).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1953

RENA O. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1954

ARTHUR W. MARBLE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-1955

CALVIN COX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the Court of Military Appeals (86-1953 Pet. App. 1a; 86-1954 Pet. App. 1a; 86-1955 Pet. App. 1a) are reported at 24 M.J. 127. The orders of the Air Force Court of Military Review (86-1953 Pet. App. 2a-3a; 86-1954 Pet. App. 2a-3a; 86-1955 Pet. App. 2a) are unreported.

JURISDICTION

The judgments of the Court of Military Appeals (86-1953 Pet. App. 1a; 86-1954 Pet. App. 1a; 86-1955 Pet. App. 1a) were entered on April 8, 1987. The petitions for writs of certiorari were filed on June 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

1. *No. 86-1953.* Following a special court-martial before a military judge at England Air Force Base in Louisiana, petitioner Hill, a member of the United States Air Force, was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. She was sentenced to an $800 forfeiture of pay, a reduction in grade, and a bad conduct discharge. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1953 Pet. App. 2a-3a). The Court of Military Appeals affirmed (*id.* at 1a).

On January 18, 1985, petitioner Hill provided a urine sample at the England Air Force Base hospital as part of a random inspection of members of her unit (Tr. 33). That day, petitioner's sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base in Texas (Tr. 74-76; GX 5). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Labs, a civilian toxicology laboratory, disclosed the presence of tetrahydrocannabinoid (THC) in petitioner Hill's urine (Tr. 181, 191). THC is the major psychoactive metabolite of marijuana; it is unique to marijuana and is found in no other substance (Tr. 165).

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Naresh C. Jain, an expert in forensic toxicology, who interpreted the test results (Tr. 159-209; GXs 6, 8, 11). Dr. Jain testified that the level of THC in petitioner Hill's urine sample was "absolutely" consistent with petitioner's use of marijuana within the 30 days preceding the date she provided the sample, and that she had most likely used marijuana within the preceding three days (Tr. 192). Dr. Jain categorically rejected any possibility that contamination of the sample or passive inhalation (*i.e.*, the absorption of marijuana by a nonuser who is in an environment in which marijuana is being used by others) could account for the THC level in petitioner's urine (Tr. 169). Dr. Jain further testified that even if urine leaked out of the two samples that had been shipped with petitioner's sample, her sample would have been unaffected. Lastly, Dr. Jain testified that all of the remaining samples in the batch with petitioner's from England Air Force Base tested negative for the presence of THC (Tr. 198-199; GX 5). Petitioner Hill did not present any evidence on her behalf.

2. *No. 86-1954.* Following a general court-martial before a military judge at Barksdale Air Force Base in Louisiana, petitioner Marble, a member of the United States Air Force, was convicted of the wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. (Supp. III) 912a. He was sentenced to five months' confinement, forfeiture of $6,000, and dismissal from the service. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1954 Pet. App. 2a-3a). The Court of Military Appeals affirmed (*id.* at 1a).

On August 30, 1984, petitioner Marble provided a urine sample at the Barksdale Air Force Base hospital for urinalysis testing as part of a random inspection of members of his unit (Tr. 63, 64). On September 4, 1984,

this sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base, Texas (Tr. 91-93). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Labs disclosed the presence of THC in petitioner Marble's urine (Tr. 256; GX 17, at 4).[1]

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Michael A. Peat, an expert in forensic toxicology, who interpreted the test results (Tr. 248-277, 311-319; GXs 5, 11-14, 17). Dr. Peat testified that the levels of THC in petitioner Marble's urine sample were "[e]xtremely consistent" with petitioner's use of marijuana within the 30 days preceding the date he provided the sample, and that it was likely that petitioner had used marijuana within the prior two or three days (Tr. 262, 265). Dr. Peat viewed as "improbable" petitioner Marble's not feeling the effects of marijuana use in light of the THC levels found (Tr. 263-264), and he categorically rejected the possibility that "passive inhalation" could account for the THC level in petitioner's urine (Tr. 269-270).

Testifying on his own behalf, petitioner Marble denied ever smoking marijuana or using "any drugs whatsoever" (Tr. 290-291), but he offered no explanation for the positive urinalysis test results (Tr. 291). Petitioner Marble also testified that about five days before giving the sample he attended an off-base party where he consumed some of the food and drinks provided by the host, but he did not contend that the food or drinks were adulterated with marijuana or another drug (Tr. 289-290, 297-298, 303). Nevertheless, to rebut any implication of innocent ingestion, the prosecution recalled Dr. Peat in rebuttal, and he

---

[1] Petitioner does not contest the validity of the chain of custody or the testing procedures used with respect to his urine sample, nor does he contest the accuracy or reliability of the scientific principles involved in the tests employed (radioammunoassay and gas chromatography/mass spectrometry) (see Pet. 3 n.1).

testified that it was "extremely unlikely" that consumption of adulterated food or drink four or five days before the urine sample was taken could account for the THC levels found in petitioner Marble's urine sample (Tr. 313). Dr. Peat did acknowledge that ingestion of hashish or hashish oil—both rarer forms of marijuana—within a shorter period of time prior to giving the sample could possibly result in THC levels similar to those found in petitioner Marble's urine (Tr. 315-316). Dr. Peat also testified that marijuana used "cold" in foods such as salads is much less effective in releasing THC within the body than marijuana which is baked or cooked, and that marijuana found in cold foods would have to be ingested in much greater amounts or in a much shorter period of time to account for the concentration of THC involved in this case (Tr. 318-319).

3. *No. 86-1955.* Following a special court-martial at Homestead Air Force Base in Florida, petitioner Cox, a member of the United States Air Force, was convicted of the wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. (Supp. III) 912a. He was sentenced to two months' imprisonment, a reduction in rank to airman basic, and a bad conduct discharge. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (86-1955 Pet. App. 2a). The Court of Military Appeals affirmed (*id.* at 1a).

On October 22, 1985, petitioner Cox provided a urine sample at the Homestead Air Force Base Hospital for urinalysis testing as part of a random inspection of active duty members assigned to the base (Tr. 32). On that day, that sample and others were shipped by registered mail to the Air Force drug detection laboratory at Brooks Air Force Base, Texas (Tr. 34-35). Subsequent screening and confirmatory tests at the Brooks laboratory and at CompuChem Laboratory disclosed the presence of ben-

zoylecgonine (BE) in petitioner Cox's urine (Tr. 78, 82; GX 7, at 1; GX 8, at 1). BE is the major psychoactive component of cocaine that is commonly detected. Its presence in the urine conclusively establishes the use of cocaine (Tr. 76, 83-85).[2]

The prosecution's case consisted of the urinalysis test results and the testimony of Dr. Michael A. Peat, an expert in forensic toxicology, who interpreted the results (Tr. 72-89; GXs 6-8). Dr. Peat testified that the levels of BE metabolite in petitioner Cox's urine samples were consistent with petitioner's use of cocaine within the 30 days preceding the date he provided the sample (Tr. 83-84).

Testifying on his own behalf, petitioner Cox denied ever using cocaine (Tr. 90-91, 93), but he offered no explanation for the positive urinalysis results (Tr. 90-96). Petitioner Cox also testified that the day before giving the sample he had watched TV and drunk a couple of beers with a friend, and that he had gone that night to a club where he had a few drinks. Petitioner Cox did not expressly contend that the beers or drinks were adulterated with cocaine or any other drug, nor did he say he felt the effects of cocaine after drinking that day (Tr. 92-93).

The trial judge instructed the court-martial panel as follows on the elements of the offense (Tr. 124-125):

> To be punishable under Article 112a of the Uniform Code of Military Justice, use of a controlled substance must be wrongful. Use of a controlled substance is wrongful if it is without legal justification or authorization. Use of a controlled substance is not wrongful if, one, done pursuant to legitimate law enforcement activities, for example an informant who

[2] Petitioner does not contest the validity of the chain of custody or the testing procedures used with respect to his urine sample, nor does he contest the accuracy or reliability of the scientific principles involved in the tests employed (Tr. 11-12; GX 1).

> is forced to use drugs as a part of an undercover operation in order not to be discovered; or, two, if done by authorized personnel in the performance of medical duties or experiments; or, three, without knowledge of the contraband nature of the substance. Use of a controlled substance may be inferred to be wrongful in the absence of evidence to the contrary. However, the drawing of this inference is not required.

Petitioner Cox did not object to this instruction, nor did he request any additional instruction (Tr. 108, 110, 129).

ARGUMENT

1. Petitioners Hill, Marble, and Cox contend (86-1953 Pet. 4-8; 86-1954 Pet. 7-25; 86-1955 Pet. 22-24) that the inference of wrongful use of marijuana authorized by *Manual for Courts-Martial, United States—1984*, Pt. IV, para. 37c(5) (*Manual*) is unconstitutional because it is irrational and because it shifts to the defendant the burden of proof on an essential element of the offense of the wrongful use of marijuana.[3] That claim is not materially different from the question presented in *Douglas* v. *United States*, No. 86-1893. For the reasons given in our brief in opposition in that case,[4] review by this Court of petitioners' contention is unwarranted.[5]

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[3] Petitioners Hill and Marble were convicted in a bench trial, so no instructions were involved.

[4] We have provided counsel for each petitioner with a copy of our brief in *Douglas*.

[5] Petitioners' reliance on *State* v. *Flinchpaugh*, 232 Kan. 831, 659 P.2d 208 (1983), is misplaced. That case did not arise in the unique context of the military system, which, for several reasons, reduces the likelihood that any particular use of contraband is innocent. See *United States* v. *Ford*, 23 M.J. 331, 336-337 (C.M.A. 1987).

2. Petitioner Marble also contends (86-1954 Pet. 25-29) that Part IV, para. 37c(5) of the *Manual* is unconstitutional because it requires the defendant to bear the burden of production on the wrongfulness element of the offense. That claim is insubstantial. As the Court of Military Appeals explained in *United States* v. *Harper*, 22 M.J. 157, 162 (C.M.A. 1986), the permissive inference authorized by the *Manual* only requires a defendant to come forward with some evidence that his use of marijuana was innocent. Shifting the burden of going forward to the defendant is not unconstitutional. *E.g.*, *Simopoulos* v. *Virginia*, 462 U.S. 506, 510 (1983); *Engle* v. *Isaac*, 456 U.S. 107, 120-121 & n.20 (1982); *Mullaney* v. *Wilbur*, 421 U.S. 684, 701-703 nn. 28, 30-31 (1975); *Barnes* v. *United States*, 412 U.S. 837, 846 n.11 (1973); *United States* v. *Harper*, 22 M.J. at 162.[6] Petitioner Marble's claim therefore lacks merit.

3. Finally, petitioner Cox contends (86-1955 Pet. 12-22) that random, compulsory urinalysis inspections are an unlawful search or seizure forbidden by the Fourth Amendment. Petitioner has waived that claim, however. The rules of procedure governing courts-martial require a defendant to raise a claim such as this one by filing a motion to suppress before entering a plea. The failure to do so amounts to a waiver of the claim absent "good cause" for the default. Rule for Court-Martial 905(b)(3) and 905(e), *Manual for Courts-Martial, United States—1984*; Mil. R. Evid. 311(a)(1) and 311(d)(2)(A); cf. Fed. R. Crim. P. 12(b)(3) and 12(f); *Davis* v. *United States*, 411 U.S. 233 (1973). Petitioner did not raise this claim at trial, and he has offered no excuse, much less good cause, for his failure to do so. Moreover, petitioner did not raise the claim before the Air Force Court of Military Review or

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[6] Petitioner Cox's reliance on *Mullaney* v. *Wilbur*, *supra*, is misplaced. *Mullaney* held invalid a state rule shifting the burden of proof to the accused, not simply the burden of going forward.

before the Court of Military Appeals. Petitioner's claim has made its debut in this Court, and this Court should therefore decline to consider it. See, *e.g.*, *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15 n.18.[7]

[7] Petitioner's claim would not warrant review by this Court in any event. The military courts have ruled that warrantless, random, compulsory urinalysis inspections do not violate the Fourth Amendment even when conducted in the absence of a reasonable suspicion that a servicemember has used contraband, *Murray* v. *Haldeman*, 16 M.J. 74, 81 (C.M.A. 1983); *United States* v. *Wade*, 15 M.J. 993, 1003-1004 (N.M.C.M.R. 1983), and the only civilian court to consider the issue has agreed with the military courts, *Committee for GI Rights* v. *Callaway*, 518 F.2d 466, 474-477 (D.C. Cir. 1975). These courts have upheld random urinalysis inspections on the grounds that (1) drug use in the armed forces poses a substantial threat to military readiness and efficiency; (2) servicemembers have a lower expectation of privacy than civilians; (3) the primary purpose of such inspections is to protect the health of the servicemembers and the ability of a unit to carry out its mission, rather than to discover evidence for a criminal prosecution; (4) unannounced drug inspections are the most effective means of identifying drug users; and (5) the military has attempted to guard the dignity and privacy of soldiers insofar as practicable. *Murray*, 16 M.J. at 81; *Callaway*, 518 F.2d at 476-477; Mil. R. Evid. 313(b). None of the cases cited by petitioner involve the unique environment of the military. They are therefore not persuasive precedents with respect to the issue of compulsory drug-testing in the armed services.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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